IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COWLITZ STUD COMPANY, Respondent, v. DANA CLEVENGER and THE DEPARTMENT OF LABOR AND INDUSTRIES, Petitioners.	)	No. 77267-3 En Banc Filed August 17, 2006

OWENS, J. -- We must determine whether the last injurious exposure rule applies to petitioner Dana Clevenger's industrial injury claim brought under the Industrial Insurance Act (IIA), Title 51 RCW. Clevenger's injury claim was initially filed in response to a low back injury she sustained while working for respondent Cowlitz Stud Company. Pursuant to the claim, the Department of Labor and Industries (Department) ordered Cowlitz Stud to pay time loss benefits. The superior court reversed, holding, as a matter of law, that the last injurious exposure rule barred liability of Cowlitz Stud because Clevenger's condition worsened when she

subsequently worked for Hampton Lumber, a nonparty employer. The Court of Appeals, Division Two, affirmed the superior court. We reverse and hold that the superior court erred in applying the last injurious exposure rule, which is inapplicable to industrial injury claims.

Facts

On May 2, 1997, Clevenger sustained a low back injury while working at Cowlitz Stud's lumber mill. Shortly thereafter, Clevenger filed an industrial injury claim with Cowlitz Stud for benefits under the IIA. On July 2, 1997, Cowlitz Stud paid Clevenger medical benefits and closed her claim. Clevenger continued working for Cowlitz Stud until May 1999.

In November 1999, Clevenger began working for Hampton, a nonparty that purchased the lumber mill from Cowlitz Stud. Clevenger experienced increased pain in her back during her employment with Hampton. Due to this pain, Clevenger stopped working for Hampton on July 5, 2000. Thereafter, Clevenger filed to reopen the May 1997 injury claim. On December 20, 2000, the Department ordered reopening of the claim. Subsequently, on May 30, 2001, the Department ordered that Cowlitz Stud "pay time loss compensation benefits from January 16, 2001 through April 4, 2001 and continue within the facts of the law." Clerk's Papers (CP) at 125. Cowlitz Stud appealed the Department's May 2001 order.

On January 11, 2002, the Board of Industrial Insurance Appeals (Board) held a hearing. At the hearing, four physicians testified. Three of the physicians, including Clevenger's treating physician, opined that Clevenger's inability to work was proximately caused by the May 2, 1997, injury she sustained while working for Cowlitz Stud. A fourth physician testified that he did not believe that the May 1997 injury proximately caused Clevenger's disability. The Board found that "Ms. Clevenger has not sustained any new injury to her low back since the industrial injury of May 2, 1997." CP at 81. The Board further found that "[c]onsistent with the nature of the disease, the claimant's lumbar degenerative condition has progressively worsened through May 30, 2001." *Id*. Thus, the Board affirmed the Department's May 2001 order.

Cowlitz Stud appealed the Board's decision to Lewis County Superior Court. On February 7, 2003, the superior court granted summary judgment in favor of Cowlitz Stud. The trial judge found that Clevenger's work for Hampton "was a proximate cause of her worsened low back condition and disability" and held that, under the last injurious exposure rule, Cowlitz Stud is "not liable for Ms. Clevenger's low back condition." CP at 6. Division Two affirmed, finding the last injurious exposure rule applicable. *Cowlitz Stud Co. v. Clevenger*, 127 Wn. App. 542, 547, 112 P.3d 516 (2005). Both Clevenger and the Department appealed and we granted review

on January 11, 2006.

IssueS

(1) Did the superior court have jurisdiction to consider the last injurious exposure rule?

(2) Does the last injurious exposure rule apply to industrial injury claims?

(3) Is Clevenger entitled to attorney fees?

Analysis

The IIA is the product of a compromise between employers and workers. Under the IIA, employers accepted limited liability for claims that might not have been compensable under the common law. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). In exchange, workers forfeited common law remedies. *Id*. This compromise is reflected in RCW 51.04.010, which states that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy." In furtherance of this policy, the IIA is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010; *see also Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) ("[W]here reasonable minds can differ over what Title 51 RCW provisions mean . . .

the benefit of doubt belongs to the injured worker.").

Standard of Review. In reviewing an order of summary judgment, "this court engages in the same inquiry as the trial court." *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993) (citing RAP 9.12; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993)). A trial court may grant summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993) (citing CR 56(c)). In reviewing a summary judgment, "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo." *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (citing *Berger v. Sonneland*, 144 Wn.2d 91, [102-03,] 26 P.3d 257 (2001)). The Board's interpretation of the IIA, while not binding, "is entitled to great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Jurisdiction. The Board and the superior court are limited to appellate review of IIA issues. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). Thus, both the Board and the superior court are limited to considering those issues decided by the Department. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (citing *Lenk*, 3 Wn. App. at 982).

Clevenger and the Department argue that the superior court exceeded its jurisdiction by considering the last injurious exposure rule, which, petitioners assert, was not considered by the Department. We agree that it would have been improper for the Board or the superior court to apply the last injurious exposure rule if not considered by the Department. *See Hanquet*, 75 Wn. App. at 663. However, the record in the present case is insufficient to determine whether the Department actually considered the last injurious exposure rule in deciding to order Cowlitz Stud to pay time loss compensation. The Department's order merely provides that Cowlitz Stud "is directed to pay time loss compensation benefits . . . within the facts of the law." CP at 125. No further findings from the Department are included in the record. Moreover, the record before the Department is not included in our appellate record. The petitioners in this case had the burden of "serv[ing] on all other parties and fil[ing] with the trial court clerk and the appellate court clerk a designation of those clerk's papers and exhibits the party wants the trial court clerk to transmit to the appellate court." RAP 9.6(a). In light of petitioners' failure to provide an adequate record on appeal to determine the Department's basis for its order, we decline to rule on this issue.[1]

[1] Clevenger also argues that Cowlitz Stud's failure to challenge the Department's reopening order precludes a challenge to the Department's subsequent order that Cowlitz Stud pay time loss benefits. We agree that an administrative order may have preclusive effect. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). However, in order for issue preclusion to be applicable, the issue must have been actually

Last Injurious Exposure Rule. An "'[o]ccupational disease'" is "such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." RCW 51.08.140.[2] In the context of occupational diseases, this court has "follow[ed] the majority of other states and adopt[ed] the last injurious exposure rule." *Tri*, 117 Wn.2d at 130. We adopted this rule to resolve the "successive carrier problem," which "arises when a worker suffers two or more episodes of disability with an intervening change of employers or change of insurance carriers by the same employer." 9 Arthur Larson, Larson's Workers' Compensation Law § 153.01[1], at 153-2 (2005). Under the last injurious exposure rule, "the insurer covering the risk during the most recent exposure bearing a causal relationship to the disability[] is liable for the entire amount of the award." *Tri*, 117 Wn.2d at 130. In *Tri*, "we adopt[ed] the rule only for purposes of determining liability among successive insurers in *occupational disease* cases." *Id*. at 140 n.13 (emphasis added). The Department's subsequent codification of the last injurious exposure rule is also limited to occupational disease cases. WAC 296-14-

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decided in the prior administrative order. *Id*. at 508. Thus, because Clevenger has failed to provide a record of the Department's basis for its decision, we reject this collateral estoppel argument.

[2] In contrast, an "'[i]njury'" is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100.

350(1).[3] This court has never applied the last injurious exposure rule in an industrial injury case.

Cowlitz Stud argues that, in *Tri*, this court impliedly extended the last injurious exposure rule to industrial injury cases. For support, Cowlitz Stud relies on the *Tri* court's citation to *Champion International, Inc. v. Department of Labor & Industries*, 50 Wn. App. 91, 746 P.2d 1244 (1987), a Division Two decision applying the last injurious exposure rule in a successive injury case. However, in *Tri*, despite the citation to *Champion*, we explicitly limited the last injurious exposure rule to occupational disease cases. 117 Wn.2d at 140 n.13. Moreover, after our decision in *Tri*, the Department codified a version of the last injurious exposure rule, WAC 296-14-350(1), which also limited the rule to occupational diseases cases. Thus, under the maxim expressio unius est exclusio alterius,[4] we presume that the Department,

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[3] The codified version of the last injurious exposure rule provides the following:

> The liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure to the injurious substance or hazard of disease during employment within the coverage of Title 51 RCW which gave rise to the claim for compensation. Such Title 51 RCW insurer shall not be liable, however, if the worker has a claim arising from the occupational disease that is allowed for benefits under the maritime laws or Federal Employees' Compensation Act.

WAC 296-14-350(1)

[4] "[T]o express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 620 (8th ed. 1999).

pursuant to its delegated legislative authority, intended the rule to not apply in injury cases. Accordingly, we find Cowlitz Stud's argument unpersuasive.

Amicus Washington State Trial Lawyers Association Foundation argues that the *Tri* court properly limited the last injurious exposure rule to occupational disease cases. We agree. In *Tri*, we adopted the last injurious exposure rule in occupational disease cases to address the "proof problem" and the "assignment of responsibility problem." 117 Wn.2d at 134-35. The "proof problem" is "the difficulty an injured worker has in proving that a specific exposure contributed to the development of his or her occupational disease." *Id*. at 135 n.8. The "assignment of responsibility problem" is "the difficulty in determining which insurer should be held responsible for what percentage of the award." *Id*. at 135.

These policy justifications support application of the last injurious exposure rule only in occupational disease cases. In *Fankhauser*, 121 Wn.2d 304, we recognized that assignment of liability in occupational disease cases "is particularly difficult because the worker often received multiple exposures over a long period of time." *Id*. at 311; *see also In re Renfro*, No. 86 2392, 1988 WA Wrk. Comp. LEXIS 15, ¶ 13 (Wash. Bd. of Indus. Ins. Appeals July 5, 1988) ("It would be difficult, and in many cases, an impossible burden to require a worker, disabled by means of an occupational disease, to prove the extent to which each employment contributed to the

ultimate disability."). In *Fankhauser*, we further found that "[t]he last injurious exposure rule avoids this problem by assigning responsibility to the last insurer at risk." 121 Wn.2d at 311. Such a justification is not persuasive in injury cases, in which "[t]he assignment of financial responsibility . . . is relatively easy" because "[b]y its very definition, an injury is a discrete and isolated event occurring at a specific moment in time." *Renfro*, 1988 WA Wrk. Comp. LEXIS 15, ¶ 12 (citing RCW 51.08.100). Similarly, we believe it is easier for a worker in an injury case to prove that a specific incident caused an injury than it is to prove that a certain exposure caused an occupational disease.

Thus, we hold that the last injurious exposure rule is inapplicable in industrial injury cases. We overrule *Champion* insofar as it is inconsistent with this opinion.[5] Accordingly, we reverse and remand.

Attorney Fees. Under the IIA, when an appellate court sustains a worker's right to relief as determined by the Board, "a reasonable fee for the services of the worker's

[5] We have found no cases in any jurisdiction applying the last injurious exposure rule in circumstances analogous to those in the present case. Several jurisdictions limit application of the rule to occupational disease cases. *See*, *e.g.*, *Univ. Park Care Ctr. v. Indus. Claim Appeals Office*, 43 P.3d 637, 639-40 (Colo. 2001); *Rankin v. Ford Motor Co.*, 1996 OK 94, 925 P.2d 39, 40; *Malt Bros. I, Ltd. v. State Farm Ins. Co.*, 654 So. 2d 570, 571 (Fla. Dist. Ct. App. 1995). Jurisdictions that apply the rule in injury cases generally require a subsequent independent aggravating event in order to trigger the rule. *See*, *e.g.*, *Cehic v. Mack Molding, Inc.*, No. 04-353, 2006 Vt. LEXIS 24, at **6 (Jan. 13, 2006); *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495 (1994); *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 645 (Del. 1993); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 782, 408 N.W.2d 280 (1987).

. . . attorney *shall* be fixed by the court." RCW 51.52.130 (emphasis added). Here, Clevenger requested attorney fees and Cowlitz Stud has not contested such an award. Thus, because we sustain the Department's order that Cowlitz Stud pay time loss benefits to Clevenger, we grant Clevenger's request for attorney fees under RCW 51.52.130. The amount of this award will be determined by the Supreme Court Commissioner or Clerk pursuant to RAP 18.1.

Conclusion

The last injurious exposure rule is applicable only in occupational disease cases. Thus, the superior court erred in applying the rule in the present case, which involves an industrial injury and not an occupational disease. Accordingly, we reverse the Court of Appeals decision upholding the superior court's summary judgment, grant Clevenger's request for attorney fees, and remand for further proceedings consistent with this opinion.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Gerry L. Alexander	Justice Tom Chambers
Justice Charles W. Johnson	
Justice Barbara A. Madsen	Justice Mary E. Fairhurst
Justice Bobbe J. Bridge	